ASSOCIATION OF
AMERICAN RAILROADS

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January 25, 2012

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Finance Docket No. 35504, Union Pacific Railroad Company—Petition for Declaratory Order

Dear Ms. Brown:

Pursuant to the Decision served by the Board on December 12, 201, please find the Comments of the Association of American Railroads ("AAR") for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a decision served December 12, 2011, the Surface Transportation Board ("Board"), in response to a petition by Union Pacific Railroad Company ("UP"), instituted a declaratory order proceeding to remove uncertainty as to whether UP tariff provisions relating to the transportation of toxic by inhalation hazardous commodities ("TIH") are reasonable under 49 U.S.C. § 11101 and 49 U.S.C. § 10702. The specific UP tariff provisions at issue "require TIH shippers to indemnify UP against all liabilities except those caused by the sole, contributory, or concurring negligence or fault of UP." Decision at 1. The Board is seeking public comment in this proceeding "[d]ue to the significance in this matter to TIH shippers, railroads, and other interested parties." Decision at 4.

The Association of American Railroads ("AAR") has a strong interest in the respective obligations and liabilities of all stakeholders involved in the rail transportation of TIH materials and in ensuring that the Board applies sound legal principles and public policy considerations when determining the reasonableness of the terms of TIH rail

transport. Accordingly, the AAR offers comments herein directed at legal and policy issues pertaining to the scope of parties' obligations regarding TIH transport. The AAR takes no position and will not address commercial interests or the specific terms of UP's, or any other railroad's, tariff provisions for TIH transport.

Discussion

The AAR submits that, as a general legal principle, it is consistent with 49 U.S.C. § 11101 and 49 U.S.C. § 10702 for a rail carrier to impose reasonable liability sharing arrangements on shippers as a condition of common carrier TIH rail transport. The relevant legal principles and public policy concerns that the AAR believes should govern the outcome of this proceeding are set forth below and have also been extensively set forth in the AAR's Testimony in Ex Parte No. 677 (Sub-No. 1), *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials.*[1]

As the Board noted in its decision in this proceeding, the AAR has already sought the issuance of a policy statement from the Board in Ex Parte No. 677 (Sub-No. 1) establishing that it would be consistent with the common carrier obligation for a rail carrier to require reasonable liability sharing terms from a TIH shipper as a condition of transport. Decision at 2.[2] The Board denied the AAR's request, stating that the Board

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[1] *See* July 10, 2008 AAR Written Testimony and August 21, 2008 AAR Supplemental Testimony in Ex Parte No. 677 (Sub-No. 1). The AAR incorporates that Testimony in this proceeding by reference.

[2] The Board's decision stated that the AAR's proposal for indemnification by shippers included "indemnification of the carrier against liability arising from the carrier's own negligence." However, the AAR's proposal did not seek shipper indemnification from *all* rail carrier liability. As described in the AAR's testimony in Ex Parte No. 677 (Sub-No. 1) at page 6, "The AAR's proposal is predicated on the premise that rail carriers would continue to assume liability for the risk of transporting TIH materials at the primary level and accept the normal risks of rail operations and accidents associated with the transport of any commodity."

instead would follow the practice of resolving issues associated with TIH transport on a case-by-case basis.[3]

The AAR also requested in Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order,* that the Board find that it would be consistent with the common carrier obligation for a rail carrier, if it chose to do so, to require reasonable liability indemnification from a TIH shipper as a condition of TIH transport.[4] In response to the AAR's request at that time, the Board recognized that there was an issue regarding liability and indemnification in connection with TIH transport, but did not address the AAR's request because the issue was not before the Board in that proceeding.[5]

I. The Board Has the Authority to Find That Liability Sharing Arrangements in Tariffs are Reasonable and Consistent with the Common Carrier Obligation

The obligations of a carrier to "provide service on reasonable request" pursuant to 49 U.S.C. § 11101(a), and to "establish reasonable...rules and practices" pursuant to 49 U.S.C. § 10702, are not statutorily defined. As the court noted in *Granite State Concrete Co., v. STB*, 417 F.3d 85 (1st Cir. 2005) ("*Granite*"): "The two statutory provisions ... do not provide precise definitions for the operative standards: section 11101 does not define what would constitute adequate service on reasonable request, and section 10702 does not define what would be reasonable rules and practices." *Id.* at 92-94. The *Granite* court (at 92) further ruled that under the statutory scheme of the ICC Termination Act of 1995 ("ICCTA") the definition and scope of these terms are to be determined by the Board on

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[3] *Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm.*, Ex Parte No. 698. (STB served Apr. 15, 2011)

[4] *See* April 9, 2009 AAR Comments and April 30, 2009 AAR Reply Comments in Finance Docket No. 35219.

[5] *Union Pacific Railroad Company – Petition for Declaratory Order,* Finance Docket No. 35219 (STB served June 11, 2009 at n. 21.

a case-by-case basis in light of all the relevant facts and circumstance. *See id.* at 92; *see also National Grain & Feed Ass'n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993); *Decatur County Comm'rs v. STB*, 308 F.3d 710, 716 (7th Cir. 2002); *GS Roofing Prods. Co. v STB*, 143 F.3d 387, 392 (8th Cir. 1998).

Not only does the Board have jurisdiction under the ICCTA to determine the scope of the common carrier obligation (*i.e.*, what constitutes a "reasonable request" for service under 49 U.S.C. § 11101(a) or a "reasonable rule or practice" under 49 U.S.C. § 10702), but it is the agency with the exclusive jurisdiction to rule on economic issues pertaining to the rail transportation of hazardous materials, including insurance and liability issues. *See*, e.g., *Akron, C. & Y. Ry. v. ICC*, 611 F2d 1162, 1170 (6th Cir. 1979) ("[Q]uestions of safety [regarding rail transport of nuclear materials] are also questions of risk and liability. A question of possible liability for damage resulting from carriage of a commodity is therefore within the Commission's jurisdiction as the regulator of the economics of interstate rail transport"); *see also Delta Airlines v. CAB*, 543 F2d 247, 259-60, 267 (D.C. Cir. 1976); *Radioactive Materials, Missouri-Kansas-Texas R.R.*, 357 ICC 458, 463-64 (1977).

In *Classification Ratings of Chemicals, Conrail*, 3 ICC 2d 331 (1986) ("*Conrail*"), the Board's predecessor agency, the Interstate Commerce Commission ("ICC"), considered liability issues in relation to the rail common carrier obligation to transport TIH materials. In that case, Conrail attempted to "flag out" from its common carrier obligation and attendant tariffs to transport TIH, arguing that the product was highly lethal and subjected Conrail to significant liability exposure.

The ICC ultimately denied Conrail's "flag out" attempt, but did so because it found that Conrail had failed to present "meaningful evidence on why it cannot accomplish what it seeks to do in a published tariff. It has not shown that it could not use the tariff (through publication of various rules) to limit liability or to gain greater control over when commodities are tendered and how they are handled." *Id.* at 337. The ICC also noted that "[T]he Commission has discretion to determine if there may be limitations on a carrier's tariff publication/common carrier obligation [regarding transport of ultra-hazardous materials].... This determination will include an analysis of ... financial evidence including insurance costs and the extent of carrier liability." *Id.*

In the *Conrail* case, the ICC recognized that the hazards and carrier liability associated with TIH transport can be considered by the agency in assessing the common carrier obligation and that such liability could be addressed in a tariff. It is important to note that, unlike in *Conrail*, the issue in this proceeding does not involve an effort to "flag out" from the common carrier obligation or tariff to transport TIH materials or impose additional operating restrictions on TIH transport.[6] Rather, the issue in this proceeding only involves the reasonableness of liability sharing for TIH transport in a common carrier tariff – an issue that was envisioned by the *Conrail* decision where the ICC noted that a carrier may seek to address its potentially enormous liability exposure

[6] While not an issue in this proceeding, the *Conrail* decision did not preclude rail carriers from imposing stricter operating requirements than mandated by federal safety and security regulations if the carrier could justify the additional requirements. In fact, although the railroads are subject to and must comply with a myriad of Federal Railroad Administration ("FRA"), Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and Transportation Security Administration rules, those regimes contemplate that additional requirements would be established by the railroads. (*e.g.*, FRA and PHMSA expressly have stated that "... parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations." 74 FR 1793 (Jan. 13, 2009).)

for a TIH incident arising from the transportation of these materials through reasonable tariffs governing common carrier service.

Although *Conrail* has been largely overruled by the STB on other grounds – *North American Freight Cars v. BNSF Railway Co.*, STB Docket No. 42060 (Sub-No. 1) (January 24, 2007) – the ICC discussion in that case, in which the agency suggested that it would be reasonable for railroads to include liability sharing arrangements in tariffs, is consistent with STB rulings under the existing statute which have held that carriers have flexibility to establish any terms that are "reasonable" under the circumstances, that they may adapt those terms "in response to changing circumstances," *Arkansas Electric Coop. Corp. - Petition for Declaratory Order*, STB Finance Docket No. 35305 (Mar. 3, 2011) at 11, and that railroads have "wide latitude" to adopt tariff provisions aimed at fostering safe and efficient transportation and recouping costs associated with the transportation services they provide to shippers." *Nat'l Grain & Feed Ass'n v. Burlington Northern R.R. Co.*, 8 I.C.C.2d 421 (1992), *aff'd in part sub nom. Nat'l Grain & Feed Ass'n v. United States*, 5 F.3d 306 (8 Cir. 1993).

Accordingly, the AAR submits that a carrier may include liability sharing terms in its common carrier service offerings involving TIH materials that address the immediate and significant concerns regarding carrier liability exposure (as described in section II below) and that such terms (1) do not constitute unreasonable practices and (2) are not unreasonable responses to requests for TIH materials transport.

II. Railroads Face Untenable Liability Exposure Solely Because of the Inherent Nature of TIH Materials

The touchstone of a reasonable practice is a finding by the Board that a specific carrier rule or practice is predicated upon a legitimate carrier concern and represents "a

reasonable accommodation between the [carrier's]... concerns and the [shippers']... service needs." *See Granite*, 417 F.3d at 92-93. In the present context, the overriding exposure concerns serve as an appropriate basis for a finding that a rail carrier imposing liability sharing and indemnity requirements as a condition of rail common carrier transportation of TIH materials would be a reasonable means of mitigating extraordinary railroad risk exposure consistent with the public interest.

Railroads typically transport approximately 100,000 carloads of TIH each year; and have an excellent hazmat safety record. In 2009 (the most recent year for which data are available), 99.997 percent of rail hazmat shipments reached their final destination without a release caused by an accident.

That record is the result of a concerted effort by the rail industry to ensure the safe transport of TIH and other hazardous materials. However, despite that effort and the railroads' overall favorable safety record, every time a railroad moves one of these shipments, it faces exposure to potentially ruinous liability for three reasons.

First, releases will happen even if the railroads do nothing wrong. The fact that the commodities move in accordance with Department of Transportation approved safety regulations does not eliminate the problem or the concern. Given the level and complexity of railroad operations—the railroad "factory floor" is outdoors and more than 140,000 miles long—it is unrealistic to expect that no rail incidents resulting in a release of TIH materials will occur. Even when the railroads do everything right, an outside event can cause an incident. (Automobiles running into sides of moving trains and natural causes such as unexpected flooding are examples of the types of TIH release incidents that could occur even where the railroad is not at fault.) In addition, terrorist activity in

today's environment presents a real concern even where railroads comply with all safety and security procedures.

Second, under our legal system, it is a fact of life that a carrier can be exposed to, and be found responsible for, enormous damage claims even where it was not at fault. Moreover, railroads face these huge risks for a tiny fraction of their business. Shipments of TIH constitute less than 0.3 percent of all rail carloads. The revenue that highly-hazardous materials generate does not come close to covering the potential liability to railroads associated with transporting this traffic, liability that is not fully insurable.

Third, and most critical, while incidents involving highly-hazardous materials on railroads are exceedingly rare, railroads could be subjected to multi-billion dollar claims solely because of the unusual characteristics of the TIH commodities themselves. An incident involving the transportation of TIH is of a far different nature and magnitude than a railroad incident involving a derailment or collision resulting in spillage or release of lading, and the difference is predicated solely on the inherently dangerous and deadly nature of the TIH lading itself. The Occupational Safety and Health Administration ("OSHA") describes the toxicological effect of chlorine (one of the principal TIH commodities transported by rail), in part, as follows:

> "Severe acute effects of chlorine exposure in humans have been well documented since World War I when chlorine gas was used as a chemical warfare agent. Other severe exposures have resulted from the accidental rupture of chlorine tanks. These exposures have caused death, lung congestion, and pulmonary edema, pneumonia, pleurisy and bronchitis..."[7]

[7] http://www.osha.gov/SLTC/healthguidelines/chlorine/recognition.html. For a further discussion of the toxicology of chlorine see Sylvia S. Talmage "Chlorine" in Handbook of Toxicology of Chemical Warfare Agents, Ramesh Chandra Gupta, editor (2009).

The reference in the above-cited OSHA discussion to the use of chlorine as a chemical warfare agent is especially noteworthy in today's security context. Chlorine was specifically manufactured for use in warfare in World War I and TIH materials such as chlorine and anhydrous ammonia (another principal TIH commodity transported by rail) continue to be used in terrorism and warfare, notwithstanding the prohibition on such use by the Geneva Protocol.[8] The wide-ranging lethal effects of TIH materials clearly present an attractive opportunity for terrorists notwithstanding the extensive security measures that the railroads have in place both on their own initiative and in compliance with federal regulations.

A train incident involving the spillage or release of coal, corn oil, or some other non-TIH material will likely be limited to a confined area near the incident site and cause a relatively localized amount of personal injury or property damage, no matter how severe the incident or how it occurred. However, because TIH disperses, often in unpredictable ways, the consequences of a TIH incident resulting in a release will not be localized, and has the potential to cause extensive death, injury, contamination, and property damage miles away from the incident site. Should an incident occur within or near a densely populated area, or should there be a popular public attraction within a few miles of the incident site in the path of a toxic TIH plume, an incident resulting in a TIH release under unfavorable meteorological conditions has the potential to be truly catastrophic and result in billions of dollars in personal injury and property damage claims.

[8] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (1925).

III. Arrangements for Sharing with Shippers the Liability Associated with TIH Transport is in Furtherance of Rail Transportation Policy Goals

Sharing the unique liabilities resulting from transport of TIH with the manufacturers and users of those commodities is consistent with the rail transportation policy of 49 U.S.C. §10101. This fact further supports a finding by the Board that liability sharing provisions in the carrier's tariff are reasonable under 49 U.S.C. §§ 10702 and 11101.

On the basis of the uniquely dangerous characteristics of TIH materials and the significant risk and exposure to the railroads in transporting such commodities, the AAR believes it is "reasonable" for a rail carrier to require a shipper to share the significant potential exposure resulting from the transport of TIH materials. An interpretation of the railroads' common carrier obligation where the enormous, uninsurable liability risk arising out of the distribution of TIH materials would be shared with the manufacturers and users of TIH materials instead of placed solely upon the rail carrier promotes rail transportation policy goals.

Several provisions of rail transportation policy at 49 U.S.C. § 10101 apply to a Board determination of a rail carrier's common carrier obligation to transport TIH materials. These policy provisions include: "to promote a safe and efficient rail transportation system" (*id.* § 10101(3)); "to ensure the development and continuation of a sound rail transportation system...to meet the needs of the public and the national defense" (*id.* § 10101(4)); "to foster sound economic conditions in transportation." (*id.* § 10101(5)); "to operate transportation facilities and equipment without detriment to the public health and safety" (*id.* § 10101(8)); and "to encourage...safe and suitable working conditions in the rail industry" (*id.* § 10101(11)).

These policies entrust the Board with promoting not only the safety and efficiency of the rail transportation system to the public, shippers and rail employees, but also the financial soundness of the rail industry. When these policies are applied to determine whether a tariff requirement for the rail transportation of TIH materials is reasonable, the Board cannot ignore that a rail carrier faces potential "bet the company" exposure each time it transports these TIH materials. The "financial soundness" of the rail industry, as well as the "public health and safety," is potentially at risk each time these materials are transported by rail.

The AAR submits that it would be consistent with and would promote the above rail transportation policy tenets if rail carriers were to remain liable for the normal risks of rail operations and accidents associated with the transportation of hazardous materials other than TIH materials plus the primary risk of transporting TIH materials up to specific insurable limits; but were also permitted to require shippers to share the extraordinary risks presented by a potential release of the extra-hazardous TIH materials they have chosen to ship by rail.

Such a sharing of risks would be "reasonable" under the circumstances. Where there is unpredictable and massive liability exposure resulting from the inherent nature of the commodity itself, the risk inherent to that commodity is appropriately shared by the manufacturer/shipper of the dangerous commodity who is the main economic beneficiary of its manufacture and transportation. The railroads would still have the same strong incentives to operate safely, but they would no longer face the unwarranted and unreasonable levels of risk and exposure that give rise to the legitimate concerns discussed in these comments.

Conclusion

Based upon the general legal principles, prior case law, and rail transportation policy considerations discussed above, the Board should find that the imposition by a rail carrier, if it choose to do so, of reasonable liability sharing arrangements with a shipper of TIH materials, as a condition of TIH transportation, is consistent with the common carrier obligation under 49 U.S.C. § 11101 and a reasonable practice under 49 U.S.C. § 10702.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January 2012, I served by e-mail, a copy of the forgoing Comments of the Association of American Railroads to those parties listed as Parties of Record in the Surface Transportation Board's decision served January 23, 2012 in Docket No. FD 35504.

Rosita M. N'Dikwe

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